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In The

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. – ALABAMA, and GREEN TREE FINANCIAL CORPORATION,

Petitioners,

v.

LARKETTA RANDOLPH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the inability of Respondent to pursue a federal Truth in Lending Act class action under the arbitration clause in the agreement she executed create a basis for invalidating the arbitration clause?

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BRIEF AMICUS CURIAE

This *amicus curiae* brief is submitted in support of the Petitioners, Green Tree Financial Corp. – Alabama and Green Tree Financial Corporation. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. The Chamber serves as the principal voice of the business community. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business. The Chamber has a particular interest in this case since it addresses an issue of great concern to its members – the enforceability in consumer contracts of pre-dispute arbitration clauses, which are used by many Chamber members.

SUMMARY OF ARGUMENT

Under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§1 *et seq.*, an arbitration agreement must be

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber of Commerce of the United States of America states that this brief was prepared in its entirety by the Chamber and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than the Chamber, its members or their counsel.

enforced as to a statutory claim unless the language, history or purpose of the statute shows that Congress intended to preclude arbitration. In her Brief in Opposition, Respondent argued that the class action is an indispensable mechanism for redressing and deterring violations of the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§1601 *et seq.* She further argued that TILA's alleged policy favoring class actions overrides the pro-arbitration policy of the FAA and therefore allows her to disavow her arbitration agreement by filing a TILA class action. These arguments should be rejected because the language, history and purpose of TILA show that Congress did not intend to preclude arbitration.

TILA and its legislative history do not mention arbitration, much less elevate a consumer's after-the-fact desire to bring a TILA class action over the consumer's pre-existing agreement with the creditor to arbitrate such disputes. To be sure, Congress has not eliminated TILA class actions altogether. Rather, in light of concerns about the risk of "horrendous, possibly annihilating punishment" in TILA class actions, *Ratner v. Chemical Bank*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972), Congress has expressly *limited* the quantum of class action relief available under TILA.

Just as Respondent cannot show that the language or history of TILA's class action provisions precludes arbitration of TILA claims, she cannot show that TILA's remedial and deterrent purposes require class actions. In an individual proceeding, TILA provides the prevailing consumer with: (1) any actual damages resulting from the violation; (2) $100 to $1,000 of statutory damages ($200 to $2,000 in connection with a closed-end loan, such as the loan to Respondent, secured by real property or a dwelling); and (3) attorneys' fees and the costs of the

proceeding. 15 U.S.C. §1640(a). Because prevailing consumers are entitled to attorneys' fees and the costs of the proceeding, consumers with valid TILA claims can readily obtain redress in individual actions, particularly proceedings that can be handled with the ease, simplicity and speed characteristic of arbitration.

Moreover, TILA's powerful administrative and criminal enforcement mechanisms serve to deter TILA violations without the necessity of any resort to class actions. Both the Federal Trade Commission (the "FTC") and the federal banking agencies are authorized to issue cease and desist orders and to obtain ancillary relief against creditors that violate TILA. These agencies can impose substantial monetary penalties against such creditors and can order them to make restitution to consumers for finance charge and annual percentage rate ("APR") disclosure errors. Indeed, these agencies are *required* to order class-wide restitution to consumers whenever a creditor systematically discloses a finance charge or APR that is materially lower than the actual figure. Creditors can also be fined and jailed for knowing and willful violations of the statute.

Since Respondent cannot show that TILA's language, history or purpose manifests a congressional intent to preclude the waiver of a judicial forum, "the fact that [TILA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (approving mandatory arbitration of a claim under the Age Discrimination in Employment Act (the "ADEA"), even though the ADEA, unlike TILA, expressly authorizes class actions) (citation omitted). Accordingly, this Court should hold that the unavailability of class action relief neither

vitiates nor excuses the enforcement of an agreement to arbitrate a TILA claim.

ARGUMENT

I. Respondent Bears The Burden Of Showing That The Text, Legislative History Or Purpose Of TILA Conflicts With Arbitration Of Her TILA Claim.

In *Gilmer*, this Court enforced under the FAA mandatory arbitration of an ADEA claim. While it acknowledged in theory that "all statutory claims may not be appropriate for arbitration," this Court went on to affirm that –

> the burden is on [the party opposing arbitration] to show that Congress intended to preclude a waiver of a judicial forum for [statutory] claims . . . . See [*Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)]. If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or any "inherent conflict" between arbitration and the [statute's] underlying purposes. *See ibid.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." [*Moses H. Cone Mem'l Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)].

500 U.S. at 26.

Under the rule enunciated in *Gilmer* and elsewhere, this Court has repeatedly held that federal statutory claims are subject to arbitration.[2] In *Moses H. Cone*, this

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[2] *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (Carriage of Goods by Sea Act); *Gilmer* (ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (securities laws); *Shearson/American Express,*

Court held that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." 460 U.S. at 20 (emphasis in original). Repeatedly, lower federal courts have held that TILA claims subject to an arbitration agreement must be arbitrated even if they have been asserted in putative class actions.[3] While two district courts have now accepted the unfounded argument that TILA's supposed purpose to promote class actions is incompatible with an arbitration clause that precludes relief in a class action,[4] as demonstrated below there is no federal policy favoring TILA class actions, and arbitration of TILA claims is fully compatible with TILA's purposes.

Inc. v. McMahon, 482 U.S. 220, 232-233 (1987) (RICO and securities laws); *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust laws).

[3] *See, e.g., Marsh v. First USA Bank, N.A.*, No. 3:99-CV-0783-T (N.D. Tex. May 24, 2000) (Lodging, Exh. A); *Brown v. Surety Finance Service, Inc.*, 2000 U.S. Dist. LEXIS 5734 (N.D. Ill. Mar. 23, 2000); *Thompson v. Illinois Title Loans, Inc.*, 2000 U.S. Dist. LEXIS 5734 (N.D. Ill. Jan 6, 2000); *Sagal v. First USA Bank, N.A.*, 69 F.Supp.2d 627 (D. Del. 1999); *Zawikowski v. Beneficial National Bank*, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999); *Randolph v. Green Tree Financial Corp.*, 991 F. Supp. 1410 (M.D. Ala. 1997), *rev'd on other grounds*, 178 F.3d 1149 (11th Cir. 1999); *Lopez v. Plaza Finance Co.*, 1996 WL 210073 (N.D. Ill. April 25, 1996); *Meyers v. Univest Home Loan, Inc.*, 1993 WL 307747 *5 n.8 (N.D. Cal. Aug. 4, 1993) (in compelling arbitration of claim of named plaintiff in TILA and state consumer protection act class action, court observed that contrary holding would carve a "gaping exception" into the FAA, allow circumvention of the FAA and "plainly undermine Congress's policy to promote the enforceability of such agreements").

[4] *Lozada v. Dale Baker Oldsmobile*, 2000 U.S. Dist. LEXIS 4122 (W.D. Mich. Mar. 27, 2000); *Johnson v. Tele-Cash*, 82 F. Supp. 2d 264 (D. Del. 1999).

II. Nothing In TILA's Language Or Legislative History Supports A Contention That TILA Class Actions Are Entitled To Any Special Protection Against Waiver Of A Judicial Forum.

In *Gilmer*, 500 U.S. at 32 (citation omitted), this Court flatly concluded:

> [E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

This Court endorsed mandatory arbitration of the ADEA claim in *Gilmer* even though the ADEA – unlike TILA – expressly authorizes class actions. Section 626(b) of the ADEA, 29 U.S.C. §626(b), provides that the ADEA shall be enforced in accordance with Section 216 of the Fair Labor Standards Act, 29 U.S.C. §216. In turn, Section 216 provides that "an action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees *for and in behalf of himself or themselves and other employees similarly situated.*" 29 U.S.C. §216(b) (emphasis added).

TILA does not contain a single reference to arbitration, either in its language or history. By contrast to the ADEA, it does not authorize class actions. As the district court in this case correctly noted:

> §1640 does not create a "statutory right" to pursue class action litigation or other judicial redress, as plaintiff contends. Section 1640 merely provides for jurisdictional requirements and liability *limitations*. Providing for class action litigation does not necessarily preclude any other type of dispute resolution or provide Plaintiff with a substantive "right".

Randolph, supra, 991 F. Supp. at 1418 (emphasis in original).

TILA's only reference to class actions is contained in Section 130(a)(2)(B), 15 U.S.C. §1640(a)(2)(B), which *limits* the relief that would otherwise be available. Conversely, under Section 130(a)(2)(A), 15 U.S.C. §1640(a)(2)(A), a plaintiff who establishes a TILA violation in an individual action is entitled to statutory damages of $100-$1,000 ($200-$2,000 in a case involving a closed-end loan, such as the loan to Respondent, secured by real property or a dwelling).[5] Under Section 130(a)(2)(B) of TILA, 15 U.S.C. §1640(a)(2)(B), statutory damages are capped in a class action, without regard to – indeed, in derogation of – the minimum recovery that class members could obtain in individual actions:

> [The class may recover] such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor.

Moreover, the maximum statutory damages award is **not** assured. Rather, the court must consider the amount of any actual damages; the frequency and persistence of compliance violations; the resources of the creditor; the number of persons adversely affected; and the extent to

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[5] The recovery of statutory damages in an individual or class action is in addition to any actual damages the plaintiff can establish under Section 130(a)(1) of TILA, 15 U.S.C. §1640(a)(1), and is also in addition to the right to attorneys' fees and costs of the proceeding under Section 130(a)(3) of TILA, 15 U.S.C. §1640(a)(3).

which violations were intentional. 15 U.S.C. §1640(a)(3). *See Kedziora v. Citicorp National Services, Inc.*, 901 F. Supp. 1321 (N.D. Ill. 1995) (applying statutory factors and awarding $37,600 to class in lieu of maximum award of $376,990).

The legislative history of TILA's class action provisions is also wholly compatible with the arbitration of individual TILA claims. When originally enacted, TILA contained no specific provisions relating to class actions. Plaintiffs pursued TILA class actions under Rule 23 but the courts expressed grave concerns that permitting class-wide recovery of the statutory $100 minimum provided by TILA "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act." *Ratner v. Chemical Bank*, 54 F.R.D. at 416.

To address this problem and to balance protection of financial institutions from disproportionate and windfall awards for technical TILA violations with competing enforcement objectives, Congress enacted specific limitations on statutory damages recoveries in TILA class actions. In 1974, the limit was initially set at the lesser of $100,000 or 1% of the creditor's net worth and, in 1976, it was adjusted to the lesser of $500,000 or 1% of net worth. While Congress did not elect to eliminate TILA class actions, it continued to express concern about the potential mischief of such proceedings:

> The committee is aware of the many difficulties surrounding the use of class actions for civil penalties or punitive damages. . . . *We are hopeful that there may be workable and effective substitutes for the class action as a consumer enforcement device not only for this Act but also for other similar legislation.*

S. Rep. No. 94-590, at 8 (1976) (footnotes omitted; emphasis added).[6]

Congress again addressed problems with TILA class actions two decades later, when it found it necessary to declare a moratorium on certain TILA class actions due to an avalanche of class actions "filed because of technical violations of disclosure requirements provided in the Truth in Lending Act." 141 Cong. Rec. H4120-04, H4122 (daily ed. April 4, 1995) (Statement of Rep. Vento). One House member explained the purpose behind the class action moratorium as follows: "Certainly when lawyers start lining their pockets based on technicalities to keep people from having to pay [borrowed] funds back, then it is time for the Congress to come forward." *Id.* Another House member asserted: "We should not even have a piece of legislation like this" permitting class actions. *Id.* at 4122. In addition, in supporting the moratorium, several House members specifically recognized that halting class actions would not defeat the remedial or policing

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[6] Many of the agency enforcement powers discussed *infra* in Section IV were adopted by Congress after the time S. Rep. No. 94-590 (1976) called for "workable and effective substitutes for the class action." In 1978, Congress afforded the federal banking agencies the power to impose civil penalties for violations of the law, including TILA. Pub. L. 95-630, §107(e)(1), adding 12 U.S.C. §1818(i)(2). In 1980, as part of the Truth in Lending Simplification and Reform Act, Congress expressly authorized the TILA enforcement agencies to order restitution for specified TILA violations and **mandated** that they order restitution for any such violations resulting from a clear and consistent pattern or practice of violations. Pub. L. 96-221, §608(a), adding 15 U.S.C. §1607(e). And in 1989, as part of the Financial Institutions Reform, Recovery, and Enforcement Act, Congress substantially enhanced the cease and desist powers of the federal banking agencies. Pub. L. 101-73, §902(a)(2)(A), adding 12 U.S.C. §1818(b)(6)-(8).

functions of TILA because the moratorium "does not prevent individual consumers from bringing suit." *Id.* at 4121.

In short, TILA's legislative history shows that Congressional concern about TILA class actions has led to the enactment of a series of *limitations* on such actions. It does not show that TILA class actions must be permitted to move forward at the expense of the fundamental public policies embedded in the FAA. Indeed, there is nothing in TILA or its legislative history that evidences any hostility to an arbitral forum.

III. Class Actions Are Not Needed To Provide Consumers With An Effective Remedy For TILA Violations.

"So long as the *prospective litigant* effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28, *quoting Mitsubishi Motors*, 473 U.S. at 637 (emphasis added). Without question, individual arbitration of a TILA claim provides an effective remedy to a prospective litigant, without the necessity of any resort to a class action.

Congress itself does not believe that class action proceedings are necessary to vindicate the rights of prospective litigants. In 1980, Congress enacted Pub. L. 96-221, §615(a)(1), amending Section 130(a)(2)(B) of TILA, 15 U.S.C. §1640(a)(2)(B). Prior to the amendment, the maximum recovery of statutory damages in a single class action was limited to the lesser of $500,000 or 1% of the creditor's net worth.[7] After the amendment, this same

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[7] In both individual and class actions, consumers have the right to any actual damages they can prove, in addition to

limitation was extended to a "series of class actions arising out of the same failure to comply by the same creditor."[8] Accordingly, Congress has effectively denied all consumers who are not included in the class that first recovers the available relief the opportunity to utilize class action procedures to obtain statutory damages. *See Turner v. Beneficial Corporation*, 67 F. Supp. 2d 1325, 1330 (M.D. Ala. 1999) ("[B]ecause the Defendants have already paid the statutory maximum in statutory penalties to a class of plaintiffs pursuant to the state court settlement approved by, enforced, and affirmed upon review by the state courts, [plaintiff] may not proceed on her class claims for statutory damages for the same TILA violation in this court."). In doing so, Congress clearly recognized that TILA's individual remedies are fully adequate to compensate consumers.

In an individual proceeding, TILA's civil liability provision specifically requires the award of: (1) any "actual damage sustained by [a consumer] as a result of the failure [to comply with TILA]," 15 U.S.C. §1640(a)(1); (2) statutory damages equal to twice the finance charge, but not less than $100 or more than $1,000 (or $200 and $2,000 for closed-end loans, such as the loan to Respondent, secured by real property or a dwelling), 15 U.S.C. §1640(a)(2)(A); and (3) attorneys' fees and the costs of the

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statutory damages. As explained *infra* (pp. 13-14), it is virtually impossible to obtain actual damages in a class action because the issue of individual reliance destroys commonality, typicality and predominance.

[8] The situation where a creditor is subjected to multiple class actions alleging the same TILA violation is most likely to arise in the context of a series of state-wide class actions.

action (including, of course, arbitration fees), 15 U.S.C. §1640(a)(3).[9]

By mandating an award of attorneys' fees and costs of the proceeding to a prevailing consumer, Congress distinguished TILA claims (and claims under many other federal consumer credit statutes) from most common law claims, ensuring that individual TILA actions remain viable. In conformity with the statute, substantial attorneys' fees have frequently been awarded under TILA, even in the absence of actual damages. *See, e.g., Ex Parte Edwards*, 601 So. 2d 82 (Ala. 1992) (directing lower court to award $43,000 in attorneys' fees); *Ratner* ($20,000 attorney fee in case awarding minimum statutory damages of $100). *Cf. Johnson v. Eaton*, 958 F. Supp. 261, 264 (M.D. La. 1997) (award of $13,410, "nearly 27 times greater than the damage award," in a case under the Fair Debt Collection Practices Act (the "FDCPA"), a statute whose civil liability provisions were patterned after TILA's).

Time and again, courts have concluded that TILA rights can be enforced effectively in individual proceedings. *See, e.g., Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d at 632 (even though "Congress recognized class action suits as a useful way to enforce the TILA . . . [b]ecause Congress has not provided for a statutory right to pursue class actions under the TILA, and because there are alternative means to bring suit thereunder, this court does not find that the TILA amounts to a 'congressional command' to preserve class action suits at the expense of the FAA. See *McMahon*, 482 U.S. at 226."); *Ratner* (concluding that an individual action was superior to a class proceeding);

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[9] In the proceedings below, either the Eleventh Circuit ignored TILA's command that a prevailing consumer is entitled to the costs of the proceeding or it assumed, incorrectly and without analysis, that this substantive right would not be available in arbitration.

Graybeal v. American Savings & Loan Ass'n, 59 F.R.D. 7, 16 (D.D.C. 1973) (because "an individual plaintiff will recover a minimum of $100, plus attorneys' fees and costs . . . the incentive offered by a class action is not necessary to enforce the provisions of the Act").

While unnecessary to support arbitration of TILA claims, we note that individual actions will frequently be superior to class actions in enforcing a prospective litigant's rights under the statute.[10] Actual damages are virtually impossible to prove in the context of a TILA

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[10] TILA class actions have been certified under Fed. R. Civ. P. 23(b)(3), suggesting that the courts in question viewed a class action to be superior to individual actions on the facts of the particular case. However, in determining arbitrability of a claim, the question under the FAA and this Court's precedent is not whether a class proceeding or an individual action is preferable in a given case. Such a rule would directly conflict with *Gilmer* because it would effectively preclude individual arbitration whenever a case, whether founded on an alleged statutory violation, breach of contract or tort, would otherwise be appropriate for class certification. It would also conflict with the Rules Enabling Act by elevating the procedural right to bring a class action over the substantive right to arbitration created by the FAA. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of the substantive claims"); *Marsh v. First USA Bank, N.A.*, Lodging, Exh. A, slip op. at 25 ("Emanating from Federal Rule of Civil Procedure 23, class actions are just that: procedural. Rules of procedure are established to facilitate the just resolution of substantive rights. As the Supreme Court has explained, courts should be 'mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right." ' *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997), *citing* 28 U.S.C. §2072(b). Accordingly, Plaintiffs are not entitled as a matter of right to proceed as a class.").

class action since a "plaintiff claiming actual damages must establish a causal connection between the inaccurate disclosure and his injury by demonstrating that he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere." *Adiel v. Chase Fed. S & L Assn.*, 630 F. Supp. 131, 133 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987).[11]

As a result of the need to prove individual reliance to establish a claim for actual damages, practically all courts that have considered the issue have refused to certify TILA classes seeking actual damages. *See, e.g., Barlow v. Evans*, 992 F. Supp. 1299, 1310 (M.D. Ala. 1997); *Hoffman v. Grossinger Motor Corp.*, 1999 U.S. Dist. LEXIS 4172 (N.D. Ill. Mar. 25, 1999); *McCoy v. Salem Mortgage Co.*, 74 F.R.D. 8, 12 (E.D. Mich. 1976).

Moreover, a consumer can almost always recover more statutory damages in an individual TILA action than in a class action. In a lawsuit against a large lender, with $50 million or more of net worth, the total class action recovery is capped at $500,000. With merely 5,000 class members, the maximum recovery of statutory damages by each class member would be only $100. This amount represents the *minimum* statutory damages in an individual proceeding. In many cases – for example, a

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[11] *See also* H.R. Rep. No. 104-193, §111 (1995) ("To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure."); 141 Cong. Rec. H9513-01, H9516 (daily ed. September 27, 1995) (statement of Rep. McCollum) ("To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure. A number of lawsuits have been filed in which plaintiffs have claims as actual damages the amount of the fees or charges that have been misdisclosed. This is not the meaning of actual damages. The proper meaning of damages is discussed in [*Adiel*].").

typical credit card program – there may be tens of thousands or even millions of class members. Thus, the prospect of a meaningful recovery for a prospective litigant in a TILA class action may be virtually nonexistent. In the words of one court:

> [I]f this class action suit went to trial and resulted in the maximum $500,000 cash award available under the [Consumer Leasing Act, a part of TILA], each class member would be entitled to less than one dollar of the total settlement. . . . Each class member would unquestionably fare better by bringing an individual action . . . [because] an individual plaintiff would be entitled to a *minimum* of $100 and a maximum of $1,000. . . . This recovery is substantially greater than the de minimus recovery that the class member would receive under §1640's $500,000 damages cap.

Clement v. American Honda Finance Corp., 176 F.R.D. 15, 23-24 (D. Conn. 1997).

In *Lewis v. Jesse L. Riddle, P.C.*, 1998 U.S. Dist. LEXIS 20465 (W.D. La. Nov. 18, 1998), an FDCPA case, the court noted that several courts have certified class actions despite the argument that each class member could obtain more in an individual lawsuit. Nevertheless, the court held that an individual proceeding was superior to a class action. It observed:

> Concerns about equity and the fair administration of justice must extend beyond this single case. The certification of this class action is guaranteed to result in substantial delays in the resolution of the merits of other cases in this division. This court has experienced its share of class actions, each of which has consumed countless hours of conference, courtroom and consideration time. Undoubtedly, similar efforts would have to be put into this case. After it is all

> said and done several people who wrote bad checks will each receive a check that might be enough to buy lunch. Will they feel vindicated? More likely, they will be angered at the fact that the attorney's fees at issue are thousands of times the amount of their paltry compensation.

Id. at *24-*25.

Nor is the right to bring an individual lawsuit under TILA merely theoretical. This Court has encountered individual TILA cases on a number of occasions. *See, e.g., Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *American Express Co. v. Koerner*, 452 U.S. 233 (1981); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205 (1981); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *Mourning v. Family Pubs. Serv.*, 411 U.S. 356 (1973).

Moreover, according to a May 15, 2000 computer search of the CaseStream® database, 167 TILA cases, of which only 22 were class actions, were filed in the federal courts from January 1, 2000 through May 15, 2000 and 539 TILA cases, of which only 44 were class actions, were filed in the federal courts in 1999. Lodging, Exh. B. These figures may significantly understate the actual volume of individual TILA litigation since CaseStream search results do not include TILA claims: (1) filed under a civil docket sheet that labels a non-TILA claim as the principal claim in the case; (2) filed in state court, as permitted by 15 U.S.C. §1640(e);[12] (3) filed in one of the (small number

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[12] The "grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive [federal procedural] protections by filing suit in state court." *Rodriguez de Quijas, supra*, 490 U.S. at 482. Among the federal procedures a plaintiff

of) federal judicial districts that is not covered by CaseStream; (4) threatened but settled or withdrawn before a formal filing; (5) initiated as an arbitration rather than a judicial proceeding; or (6) filed as a counterclaim in a collection lawsuit.

In many cases without substantial actual damages, a consumer may conclude that the statutory damages available under TILA do not justify litigating a perceived technical violation of TILA. The consumer's decision to eschew litigation (or arbitration) is entirely voluntary, however, since Congress assured that the *opportunity* to vindicate an individual TILA claim for statutory damages and any actual damages remains viable. Of course, if individual judicial proceedings suffice to vindicate consumer rights, individual arbitration proceedings, with their relative simplicity, speed and cost-effectiveness,[13] provide an even better mode of enforcement.[14]

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may waive by filing a case in state court is the right to pursue a class action under Rule 23. *See, e.g., Marx v. Broom*, 632 So. 2d 1315, 1322 (Miss. 1994) (noting that Mississippi courts do not allow class actions).

[13] "[Alternative dispute resolution] has been used in the private sector for many years and has proven to be quicker, less costly, and more efficient than litigation in resolving disputes." H.R. Rep. No. 103-652, §309 (1994) (explaining the rationale for adoption of 12 U.S.C. §4806, providing for the use of alternative dispute resolution for disputes involving the federal banking agencies). *See also* Brief of American Bankers Association, American Financial Services Association, and Consumer Bankers Association as *Amici Curiae* in Support of Petitioners ("Trade Association Brief"), Section II.B.

[14] Not only can consumers obtain redress for TILA violations directly in individual proceedings, they can obtain relief indirectly by lodging complaints with the FTC or the appropriate federal banking agency. Each such agency provides convenient mechanisms for consumers to submit complaints in

IV. Class Actions Are Not Needed To Deter Violations of TILA.

Under *Gilmer*, the proper focus in determining whether to enforce an agreement providing for arbitration of a statutory claim is whether the *prospective litigant* should be able to vindicate his or her substantive rights in arbitration. As explained above, consumers have an excellent opportunity to enforce their rights through individual arbitrations.

Respondent argued in her Brief in Opposition (Opp. 19-21), however, that TILA is incompatible with the arbitration clause in this case because enforcement of the clause would lessen the incentive for TILA compliance. This argument would apply equally – indeed, with greater force – to virtually any other statute that could give rise to class actions, including the Carriage of Goods by Sea Act, the ADEA, the federal securities laws, the federal antitrust laws and RICO. Of course, this Court has previously enforced agreements to arbitrate claims under each of these statutes. *See* n. 2, *supra*.

In *Gilmer*, 500 U.S. at 32, this Court emphasized that enforcement of the parties' arbitration agreement "will not preclude the [administrative agency] from bringing actions seeking class-wide and equitable relief." By the same token, enforcement of arbitration agreements for TILA claims will have no effect on the powerful deterrent force of agency and criminal enforcement mechanisms provided by TILA. These enforcement mechanisms make

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writing, by telephone or by e-mail. *See* Lodging, Exh. C (collecting web site materials of TILA enforcement agencies).

class actions unnecessary to ensure a high level of TILA compliance.[15]

A discovery by the FTC or a banking agency that a regulated institution may be in violation of TILA carries with it a direct and substantial risk to the institution. Under Section 108 of TILA, 15 U.S.C. §1607, the FTC and the federal banking agencies are afforded sweeping enforcement powers with respect to TILA violations committed by creditors within their jurisdiction. Violations of TILA by banking and savings institutions are treated as violations of Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. §1818, and violations of TILA by most other creditors are treated as violations of the Federal Trade Commission Act (the "FTC Act").[16] 15 U.S.C. §§1607(a)-(c).

If a bank violates TILA, the appropriate agency may initiate cease and desist proceedings and obtain an order that requires the offending institution, among other

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[15] The Federal Deposit Insurance Corporation ("FDIC") reports that fully 96% of approximately 2,000 banks it examines had either satisfactory or outstanding legal compliance ratings at the end of 1998, leaving only 4% (or about 80) of these banks with less than satisfactory ratings. *See* FDIC, *1998 Annual Report* 34 (Aug. 1999). Lodging, Exh. D. Significantly, the FDIC formally required a total of 161 banks to reimburse consumers for TILA violations. This figure **doubles** the 4% of FDIC supervised banks that failed to achieve satisfactory or outstanding compliance ratings in 1998. *Id.* The Federal Reserve Board ("FRB") reports that 74% of the institutions it examined during the 1998 reporting period were in full compliance with Regulation Z (which implements TILA) and that 62% of the non-compliant institutions had only one to five violations. FRB, *85th Annual Report 1998* 223. Lodging, Exh. E.

[16] TILA compliance is also enforced in certain limited cases by the National Credit Union Administration, the Secretary of Transportation or the Secretary of Agriculture.

things, to: (1) cease and desist the unlawful conduct; (2) make restitution or provide reimbursement against loss in the case of unjust enrichment or reckless disregard for the law; (3) rescind the underlying agreement; or (4) take such other action as the agency determines to be appropriate.[17] 12 U.S.C. §1818(b). In addition, the agency can remove from office any institution-affiliated party who has directly or indirectly violated TILA – including any officer, director and employee, as well as any attorney or other independent contractor who has knowingly or recklessly participated in any TILA violation – and can prohibit such person from further participation in the affairs of any insured depository institution. 12 U.S.C. §§1813(u), 1818(e). The agency can also obtain civil penalties of not more than $25,000 per day during the continuation of any TILA violation that is reckless or part of a pattern of misconduct (or $5,000 per day for any other TILA violation).[18] 12 U.S.C. §1818(i).

Like the federal banking agencies, the FTC has authority to issue cease and desist orders and seek restitution in the event of a TILA violation by a creditor under its jurisdiction. 15 U.S.C. §§45, 1607(c). *See, e.g., In the Matter of Guild Mortgage Company*, 113 F.T.C. 1183 (1990). In addition, the FTC can commence a civil proceeding to obtain: (1) a civil penalty of up to $10,000 for each violation, Section 5(m) of the FTC Act, 15 U.S.C. §45(m); (2) an injunction and ancillary relief, Section 13(b) of the FTC Act, 15 U.S.C. §53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . .

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[17] The authority to order restitution, reimbursement, rescission and other appropriate action was created in 1978. See n. 6, *supra*.

[18] This authority was created in 1978. See n. 6, *supra*.

[including] rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages . . . " Section 19(b) of the FTC Act, 15 U.S.C. §57b(b). *See, e.g., United States v. National Financial Services, Inc.*, 98 F.3d 131, 139 (4th Cir. 1996) (affirming award of $500,000 in civil penalties pursuant to Section 5(m) of the FTC Act for a violation of the FDCPA); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991) (following *Singer* and affirming award of monetary equivalent of rescission).

The FTC's exercise of its power to redress violations of TILA and the FTC Act is illustrated by a recent consent decree obtained by the FTC in *United States v. Mazda Motor of America, Inc.*, Civ. Action No. SACV 99-1213 AHS (EEx) (C.D. Cal. Oct. 7, 1999). Lodging, Exh. F. This consent decree has its roots in 1997, when the FTC charged that the leasing advertising of Mazda and four other motor vehicle manufacturers did not comply with the Consumer Leasing Act (a part of TILA) and the FTC Act. Mazda and the other manufacturers consented to orders requiring clear and conspicuous disclosure of specified information in connection with any advertisement of payments due at lease inception. *In re Mazda Motor of America, Inc.*, FTC Docket No. C-3714 (FTC Feb. 6, 1997). Lodging, Exh. G. "The FTC found, however, that Mazda's television leasing ads continued making disclosures that were in small and unreadable print, offset by distracting images or sounds, or that appeared on the screen for too short a time." FTC Press Release dated Sept. 30, 1999, *Mazda to Pay $5.25 Million for Violating FTC*

and State Orders Regarding Lease Advertisements (the "Mazda Release"). Lodging, Exh. H. As a result of these practices, Mazda ultimately agreed to pay $4.05 million in civil penalties at the direction of the U.S. Department of Justice and a total of $1.2 million in fines and costs to 24 states. *Id.* The FTC observed: "This substantial penalty should not only deter future violations of the Commission's order by Mazda, but send a strong signal to everyone in the automobile industry – manufacturers, dealers and advertising agencies – that important leasing information cannot be buried in fine print." *Id.*[19]

In 1980, as part of the Truth in Lending Simplification and Reform Act, Congress added a critical additional weapon to the agency enforcement arsenal.[20] Pub. L.

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[19] Further examples of recent FTC enforcement activities under TILA include: (1) a consent order requiring a mortgage lender to pay $1.3 million of consumer redress and administrative costs; (2) consent judgments against seven subprime mortgage lenders *and their owners*, requiring consumer redress aggregating $572,500, imposing injunctive relief, requiring performance bonds and, in one case, banning any future involvement with high-cost home loans; (3) an ongoing lawsuit against a mortgage company in the Washington, DC area *and its owner*, seeking refunds of monies paid by consumers, disgorgement of improper gains, rescission of contracts and permanent injunctive relief; (4) orders imposing both general and specific requirements with respect to the leasing advertisements of two major computer manufacturers; and (5) consent agreements with six Philadelphia-area vehicle dealerships imposing general and specific requirements with respect to lease and credit advertisements. *See* January 6, 2000 letter from the Chairman of the FTC to the Director of the FRB's Division of Consumer and Community Affairs. Lodging, Exh. I.

[20] In the Truth in Lending Simplification and Reform Act, Congress simultaneously enhanced the enforcement powers of

96-221, §608(a), adding Section 108(e) of TILA, 15 U.S.C. §1607(e). Under Section 108(e) of TILA, whenever a creditor discloses a finance charge or APR that is materially inaccurate, the appropriate TILA enforcement agency is authorized to order restitution, based upon the difference between the actual and disclosed finance charges (or dollar equivalent thereof, in the case of an improper APR disclosure). Moreover, subject to limited exceptions, the agency is *required* to order restitution whenever the violation results from either a clear and consistent pattern or practice of violations (as will inevitably be the case for violations suitable for private class certification), gross negligence or willful violation intended to mislead the consumer. This powerful enforcement mechanism is *not* available to private litigants, who must show reliance under *Adiel* and its progeny in order to obtain actual damages and thus are not entitled to recover the difference between the disclosed finance charge and the actual finance charge (or the dollar equivalent thereof, in the case of an improper APR disclosure).[21]

The agencies have shown that they are fully prepared to exercise their restitution authority. The FRB reports that the FDIC, the Office of Thrift Supervision ("OTS") and the FRB required a total of 205 financial institutions to refund $2.3 million to consumers in 1998 because of

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the TILA enforcement agencies and limited the relief available in a series of similar TILA class actions, thereby placing greater relative reliance on TILA's administrative enforcement mechanisms.

[21] The TILA enforcement agencies can (and do) order class-wide relief without regard to the procedural requirements of Fed. R. Civ. P. 23 and the numerous difficulties and legal costs associated with implementing compliance with the Rule.

improper TILA disclosures. FRB, *85th Annual Report 1998* 223. Lodging, Exh. E.

On occasion, an enforcement agency has needed to enforce a restitution order in court. *See, e.g., Stutsman County State Bank v. FDIC*, 207 F.3d 464 (8th Cir. 2000) (failure to properly disclose processing fees ranging from $27 to $59 on 25,640 accounts resulted in required restitution of almost $1.5 million despite disclosure of fees in telephone script and/or written credit approval letters);[22] *First Nat'l Bank of Council Bluffs, Iowa v. Office of the Comptroller of the Currency*, 956 F.2d 1456 (8th Cir. 1992) (restitution order addressing improper APR disclosures affecting 691 discounted variable rate loans affirmed in part and reversed and remanded in part for further consideration of statute of limitations issues). Reported restitution cases and orders represent the "tip of the iceberg," however, since the TILA enforcement agencies ordinarily do not need to resort to formal restitution actions when they discover TILA violations. Rather:

> The agencies anticipate that most financial institutions will voluntarily comply with the restitution provisions of section 608 [sic] as part of the normal regulatory process. If a creditor does not voluntarily act to correct violations, the agencies will use their cease and desist authority to require correction. . . .

Federal Financial Institutions Examination Council, *Regulation Z: Joint Notice of Statement of Enforcement Policy*, 45 Fed. Reg. 48712, 48713 (July 21, 1980). *See, also*, Alan J.

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[22] Based on the $8,780,000 of equity capital reported by this bank to the FDIC as of December 31, 1999, Lodging, Exh. J, the **maximum** private TILA class action recovery against the bank would have been only $87,800.

Dombrow and Walter E. Zalenski, *The TILA Reimbursement Rules After the Rodash Amendments*, ABA Bank Compliance, p. 9 (March/April 1998) ("[T]he intent of the agencies is to lessen the adversarial nature of the process by explaining why reimbursement is necessary and requesting the institution to take voluntary action to avoid being told to do so under a C&D order. As a result, most reimbursement actions since 1980 have been made 'voluntarily.' "). Lodging, Exh. K.

Moreover, all of the federal banking regulatory agencies conduct regular examinations to determine whether the institutions within their supervisory jurisdiction are operating in a safe and sound manner and are complying with the Community Reinvestment Act (the "CRA"), 12 U.S.C. §§2901 *et seq.*, TILA and other applicable laws. The agencies then assign numerical safety and soundness and general compliance ratings and descriptive ("outstanding"; "satisfactory"; "needs to improve") CRA ratings on the basis of these examinations. An institution's noncompliance with TILA can adversely affect the ratings the institution receives on its safety and soundness examination for both management quality and overall quality, and could also adversely affect its CRA rating.

In adopting its "Uniform Financial Institutions Rating System," the Federal Financial Institutions Examination Council, a body composed of the Office of the Comptroller of the Currency (the "OCC"), FRB, FDIC, OTS and National Credit Union Administration, explained the significance of the institution's compliance with applicable law. 61 Fed. Reg. 67021 (Dec. 19, 1996). Under this rating system, each institution is assigned a composite safety and soundness rating based on an evaluation and rating of six essential components: (1) capital adequacy;

(2) asset quality; (3) management; (4) earnings performance; (5) adequacy of liquidity; and (6) sensitivity to market risk, with composite and component ratings being assigned numerical ratings from 1 (best) to 5 (worst). *Id.* at 67025. "[T]he management component is given special consideration when assigning a composite rating." *Id.* "The capability of the board of directors and management . . . to ensure . . . compliance with applicable laws and regulations is reflected in this rating." *Id.* at 67027. Top rated institutions, with composite 1 and 2 ratings, "are in substantial compliance with laws and regulations" while lower rated institutions, with composite 3 and 4 ratings, "may be in significant noncompliance with laws and regulations" *Id.* at 67026.

By the same token, non-compliance with the law, including TILA, also adversely affects an institution's CRA compliance rating. *See* 12 C.F.R. §25.28(c) (evidence of illegal credit practices adversely affects OCC's evaluation of bank's CRA performance); 12 C.F.R. §22.28(c) (same for FRB); 12 C.F.R. §345.28(c) (same for FDIC); 12 C.F.R. §563e.28(c) (same for OTS). Each of the federal banking agencies has adopted a regulation providing that an institution's record of CRA performance will be taken into account and may serve as the basis of denial for specified applications, including applications for: (1) a new charter or deposit insurance; (2) the establishment of a branch or the relocation of a home office or branch; (3) a merger, consolidation, branch acquisition or similar transaction; or (4) the acquisition of shares or assets of a regulated financial institution.[23] Moreover, adverse management, composite and/or CRA ratings can preclude a financial institution and its affiliates from exercising

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[23] 12 C.F.R. §25.29 (OCC); 12 C.F.R. §228.29 (FRB); 12 C.F.R. §345.29 (FDIC); 12 C.F.R. §563e.29 (OTS).

powers otherwise authorized by the recently enacted Gramm-Leach-Bliley Act, Pub. L. 106-102 (1999). Section 4(l) of the federal Bank Holding Company Act (the "BHCA"), 12 U.S.C. §1843(l), enacted as part of the Gramm-Leach-Bliley Act, prohibits a bank holding company from conducting certain activities, directly or indirectly through subsidiaries, that are "financial in nature" (which includes under Section 4(k) of the BHCA, 12 U.S.C. §1843(k), insurance and securities underwriting; insurance agency activities from outside small towns; merchant banking; and other activities) if any insured depository institution subsidiary of such holding company is not "well managed" or has received in its most recent CRA examination a rating of less than satisfactory.[24] Similar prohibitions apply to any insured depository institution that seeks to undertake activities that are "financial in nature" through subsidiaries if the institution or any of its affiliated insured depository institutions receives a less than satisfactory CRA rating. *See* 12 U.S.C. §§24a, 1831w(a) and 1843(l)(2).

The reality and threat of agency enforcement actions by the FTC and the federal banking regulators, and the prospect of poor examination results, while fully sufficient of themselves to deter non-compliance with TILA, are by no means the only public mechanisms available to deter violations. State authorities also enforce TILA compliance, generally through state unfair trade practices or "mini-FTC" statutes that broadly proscribe unfair and deceptive acts and practices. For example, as reflected in

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[24] In order to be "well managed," an institution must receive a composite safety and soundness rating of 1 or 2 and at least a satisfactory rating for management. 12 U.S.C. §1841(o)(9).

the Mazda Release, Lodging, Exh. H, 24 states obtained $1.2 million of fines and costs arising from Mazda's alleged lease advertising violations. Also, the New York State Banking Department recently announced the settlement for $12 million of a case involving, among other things, alleged violations of the Home Ownership Equity Protection Act provisions of TILA. *Superintendent Announces Landmark Settlement with Lender* (Aug. 19, 1999). Lodging, Exh. L. By the same token, the New York Attorney General has warned New York automobile dealers that violations of TILA in the credit sale or lease of motor vehicles are considered "deceptive" practices that may give rise to enforcement actions. *New York State Attorney General's Office Advertising Guidelines for Auto Dealers*. Lodging, Exh. M.

TILA violations are further deterred by TILA's criminal liability provision. Under Section 112 of TILA, 15 U.S.C. §1611, any person who willfully and knowingly violates TILA is criminally liable and subject to a $5,000 fine, a year in prison or both. Moreover, TILA violations are deterred by the threat of delayed loan rescission, an individual remedy provided by TILA with respect to specified loans secured by the consumer's principal residence.[25] Under Section 125 of TILA, 15 U.S.C. §1635, consumers have the right to rescind these loans at any time within three years after loan closing if the creditor fails to provide materially accurate TILA disclosures. A valid rescission results in the creditor's loss of its security

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[25] *See James v. Home Constr. Co.*, 621 F.2d 727, 730-31 (5th Cir. 1980) ("the rescission remedy [is] a purely personal remedy"); *Jefferson v. Security Pac. Fin. Servs.*, 161 F.R.D. 63, 69 (N.D. Ill. 1995) ("Under Section 1635, individuals must choose to assert the right to rescind, on an individual basis and within individual time frames before filing suit").

interest in the dwelling and an obligation to refund *all* charges incurred by the consumer in connection with the loan (*e.g.*, interest, points, application fees, appraisal costs, title insurance premiums, etc.). Accordingly, this remedy can result in draconian potential exposure to creditors,[26] providing creditors with a powerful additional incentive to ensure that TILA violations do not infect their home loan portfolios.

In sum, despite Respondent's protestations in her Brief in Opposition to the contrary, the unavailability of class action relief under a consumer arbitration agreement does not conflict with the purposes of TILA by eliminating or even significantly reducing the incentive for creditors to comply with the statute.[27]

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[26] For a home loan of $100,000, originated for three points and $500 of additional loan costs at a 7% interest rate, the amount in controversy if the consumer purports to rescind the loan on the eve of its third anniversary would approximate $24,500 ($3,000 in points; $500 of additional loan costs; and approximately $21,000 of interest, ignoring the effects on interest charges of any principal amortization). Clearly, this type of exposure, when applied to more than a handful of loans, can lead to catastrophic liability.

[27] In refusing to enforce arbitration of a TILA claim based on their conclusion that the elimination of class action exposure would eliminate any meaningful incentive for creditors to comply with TILA, the district courts in *Lozada v. Dale Baker Oldsmobile*, 2000 U.S. Dist. LEXIS 4122 (W.D. Mich. Mar. 27, 2000), and *Johnson v. Tele-Cash*, 82 F. Supp. 2d 264 (D. Del. 1999), did not mention, let alone analyze, the effect of TILA's administrative and criminal enforcement provisions. Nor did either court consider economic and other mechanisms promoting TILA compliance. Such mechanisms would include, without limitation, creditor concerns about: (1) the potential loss of customer goodwill and reputation (*see* the Trade Association Brief, Section II.C); and (2) the necessity of

CONCLUSION

For the foregoing reasons, this Court should hold that the unavailability of class action relief neither vitiates nor excuses the enforcement of an agreement to arbitrate a TILA claim.

Respectfully submitted,

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demonstrating TILA compliance to potential loan purchasers, agencies rating potential loan securitizations and entities considering corporate mergers with or acquisitions of the creditor.